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Before the
Federal Communications Commission
Washington, DC 20554

Applications of America Online, Inc.	)	
and Time Warner Inc. for	)	CS Docket No. 00-30
Transfers of Control	)	

COMMENTS OF
MEMPHIS NETWORX, LLC

Memphis Networx, LLC ("Memphis Networx"), by its attorneys, hereby submits its comments in response to the Commission's Public Notice (DA-00-689) in the above-captioned proceeding. The Public Notice invites interested parties to comment on the Applications of America Online, Inc. and Time Warner Inc. (together, "AOL Time Warner") for the Commission's consent for a proposed transfer of control of various licenses held by the companies pursuant to sections 214 and 310(d) of the Communications Act of 1934, as amended ("Act").

I. INTRODUCTION AND SUMMARY

Memphis Networx is a Memphis, Tennessee-based limited liability corporation created to provide a variety of telecommunications services in Tennessee. Memphis Networx is a joint venture of Memphis Light, Gas & Water Division ("MLGW"), a division of the City of Memphis, and A&L Networks, Tennessee, LLC. Memphis Networx plans to construct facilities to provide wholesale services to carriers and retail services to large commercial and government end users. Over time, Memphis Networx hopes to expand its operations to serve small commercial and residential customers.

Memphis Networx fundamentally believes in an "open-network" approach to providing telecommunications services, and as such, it plans to offer high-quality

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telecommunications services both to its competitors on a wholesale basis and to retail end users. This open-network approach is consistent with Memphis Networx's roots in the public utility business, where MLGW operates an open access gas distribution system, and the competitive telecommunications industry generally, where many carriers offer their networks to both wholesale and retail customers. Indeed, one of the fundamental goals of the 1996 amendments to the Act was to extend the open access, wholesale/retail model common in competitive market segments to the historic telephone monopolies to benefit "all Americans by opening all markets to competition."[1]

Although much of the telecommunications industry is actively embracing the open access model that Memphis Networx is pursuing, AOL Time Warner has thus far refused to provide open access to its cable networks. AOL Time Warner alleges that its proposed merger will serve the public interest; however, it is apparent from AOL Time Warner's pleadings that the only interest being served by the merger is its own. AOL Time Warner spends numerous pages in its Supplemental Filing demonstrating how it plans to offer its content services through any transport medium available.[2] At the same time, however, AOL Time Warner will not provide competitors with access to Time Warner's cable holdings for the same purpose. Moreover, Time Warner is actively trying to protect its competitive position by preventing new

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1 Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., at 1 (1996) ("Joint Statement"). *See also Promotion of Competitive Networks in Local Telecommunications Markets*, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217 and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 99-141, ¶ 23 (rel. July 7, 1999)("In time, it is likely that the incumbent LECs will cease to be viewed as the presumptive primary providers of interconnection, and indeed they will begin to seek interconnection and other arrangements with their challengers.").

2 *Applications of America Online, Inc. and Time Warner Inc. for Transfers of Control*, CS Docket No. 00-30, Supplemental Information, 15-19 (filed March 21, 2000) ("Supplemental Information").

entrants, such as Memphis Networx, from competing against Time Warner in local telecommunications and cable television markets.

Memphis Networx does not oppose *per se* the proposed AOL Time Warner merger. To this point, however, AOL Time Warner has failed to demonstrate that the merger is consistent with the public interest. In Memphis Networx's view, the AOL Time Warner merger, as presently configured, poses real and substantial public interest risks. Until such time as AOL Time Warner provides actual open access to its cable networks and takes a neutral view of the entry of competitors into local markets, AOL Time Warner cannot demonstrate that its proposed merger is consistent with the public interest.

II. AOL TIME WARNER HAS FAILED TO DEMONSTRATE THAT THE PROPOSED MERGER IS CONSISTENT WITH THE PUBLIC INTEREST IN ACCORDANCE WITH THE COMMISSION'S MERGER REVIEW FRAMEWORK

Under the Commission's merger review framework, applicants bear the burden of demonstrating that their merger will produce affirmative public interest benefits.[3] In analyzing whether applicants have met their burden, the Commission engages in a four-part inquiry:

(1) whether the merger would violate the Communications Act;

(2) whether the merger would violate the Commission's rules;

(3) whether the merger would frustrate the Commission's ability to enforce the Communications Act or substantially impair its efforts to achieve the goals of the Act; and

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3 *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025, ¶ 10 (1998) ("MCI WorldCom Order").

(4) whether affirmative public interest benefits would be realized that would not result but for the merger.[4]

Although the proposed transaction will not violate expressly the Act or the Commission's rules, the proposed AOL Time Warner merger as presently configured will substantially impair the Commission's efforts to achieve the goals of the Act and will not produce "but for" public interest benefits. As such, the proposed transaction does not satisfy the Commission's merger standard, and therefore must be rejected.

A. The Proposed Merger Will Impair The Commission's Efforts To Achieve The Goals Of The Act

In evaluating mergers, the Commission considers the possible competitive effects of the proposed transfers and the effect of the merger on the broader goals of the Act and federal communications policy.[5] Congress has noted that two of the primary goals of the 1996 amendments to the Act include: (1) opening local exchange and exchange access markets to competition and (2) promoting innovation and investment by all participants in the telecommunications marketplace.[6] If approved in its present form, however, the AOL Time Warner merger would substantially impair the Commission's ability to "open all communications markets to competition."[7]

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4 *Qwest Communications International, Inc. and U S WEST, Inc., Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Landing License*, CC Docket No. 99-272, Memorandum Opinion and Order, ¶ 12 (rel. March 10, 2000) ("Qwest U S WEST Order").

5 MCI WorldCom Order, ¶ 9.

6 Joint Explanatory Statement, 1.

7 Qwest U S WEST Order, ¶ 9.

Time Warner is actively attempting to foreclose Memphis Networx from competing as a facilities-based, open-network provider in Tennessee, where Time Warner operates as a telecommunications provider and monopoly cable television provider. The efforts of Time Warner against Memphis Networx are acting to limit, rather than expand, competition in local exchange and exchange access markets in Tennessee.[8] The actions of Time Warner similarly are serving to discourage, rather than promote, innovation and investment by Memphis Networx in telecommunications infrastructure in Tennessee.[9] Thus, Commission approval of the AOL Time Warner merger at this time would effectively sanction Time Warner's opposition to competition in Tennessee and frustrate the underlying goals of federal communications policy.

B. The Proposed Merger Will Not Produce "But For" Public Interest Benefits

Memphis Networx recognizes that AOL Time Warner has filed with the Commission a "Memorandum of Understanding" ("MOU") describing a "framework" for how AOL Time Warner eventually may offer competitive Internet service providers access to Time Warner's cable plant for delivering content-based services. Significantly, however, the AOL Time Warner "open access" MOU contains no concrete commitments. Indeed, the MOU represents merely a three-page list of ambiguous, non-binding, and unenforceable "commitments." In other proceedings, the Commission has rejected the proffer of such "paper promises," noting that "promises of *future* performance to address particular concerns ... have no

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8 Affidavit of Ward Huddleston, Jr. on Behalf of Memphis Networx, LLC, ¶ 5 ("Huddleston Affidavit"), attached hereto as Tab 1.

9 *Id.*

probative value."[10] As such, for purposes of this proceeding, the FCC should continue to view Time Warner's cable holdings as systems closed to competitive content providers.

AOL Time Warner also appears to assert that its "AOL Anywhere" strategy will produce "but for" public interest benefits. Through the "AOL Anywhere" effort, AOL is attempting to enable consumers to access AOL Internet content through any and all network providers (*e.g.*, land-line telephone, cable, wireless, satellite, *etc.*).[11] While this is a laudable business goal for AOL, this will not produce "but for" benefits for consumers. This strategy is designed to benefit AOL by expanding its addressable customer base by making AOL available ubiquitously through all types of communications networks. The "AOL Anywhere" effort began well before the proposed merger, and would likely continue whether or not the merger occurred.[12]

Taken together, moreover, "AOL Anywhere" in concert with the MOU and Time Warner's opposition of facilities-based competition in its serving areas paints a picture of an "AOL Anywhere, Competitors Nowhere" strategy.[13] First, AOL wants consumers to access its Internet content through all available network infrastructure. Second, the AOL Time Warner MOU makes vague, unenforceable commitments of future action to implement an open-access "framework." Third, Time Warner is utilizing all available means of foreclosing new

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10 *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, 12 FCC Rcd 20543, ¶ 55 (1997)(emphasis original). Memphis Networx recognizes that this Commission order specifically addressed Bell Operating Company compliance with section 271 of the Act. The basic principle, however, remains the same: paper promises, such as the AOL Time Warner MOU, have no probative value.

11 Supplemental Information, 15.

12 *Id.* Indeed, even AOL notes that its "AOL Anywhere" strategy is "longstanding."

13 Huddleston Affidavit, ¶ 5.

competitors, such as Memphis Networx, from constructing overbuild facilities in Time Warner's service area. In aggregate, these factors demonstrate that the proposed merger will not produce "but for" public interest benefits. To the contrary, the confluence of these factors suggests that the proposed transaction presents significant public interest risks.

III. TO REMEDY THESE DEFICIENCIES, THE COMMISSION SHOULD REQUIRE AOL TIME WARNER TO OPEN ITS CABLE NETWORKS TO COMPETITION AND SUPPORT COMPETITIVE ENTRY IN ALL MARKET SEGMENTS

Based on the existing record, AOL Time Warner has failed to meet its burden of demonstrating that the proposed merger will produce public interest benefits. In order to satisfy the public interest standard, the Commission should require AOL Time Warner to make a concrete and enforceable commitment to open its cable holdings to competitive content providers. In addition, the Commission should require AOL Time Warner to commit to taking a neutral stance to the entry of facilities-based network providers in areas in which Time Warner provides telecommunications and cable services. Such commitments on the part of AOL Time Warner would provide concrete support for a Commission finding that the proposed merger is consistent with the public interest.

The Commission repeatedly has made clear that it has ample statutory authority to impose conditions on its approval of a proposed merger to ensure that the transaction will serve the public interest. In approving the Bell Atlantic/NYNEX merger, for example, the Commission concluded that "[t]he Communications Act permits the Commission to impose [on any proposed merger] conditions as are necessary to serve the public interest."[14] Section 214(c)

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[14] *Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*,

of the Act empowers the Commission to attach to licenses "such terms and conditions as in its judgment the public convenience and necessity may require."[15] Section 310(d) provides that no construction permit or station license may be transferred, assigned, or disposed of in any manner except upon a finding by the Commission that the "public interest, convenience, and necessity will be served thereby."[16] In addition, section 303(r) gives the Commission authority to prescribe restrictions and conditions that may be necessary to carry out the provisions of the Act. In sum, the Act empowers the Commission to attach conditions to a transfer of lines and licenses to ensure that the public interest is served by the proposed transaction.[17]

As noted, the AOL Time Warner merger in its present form does not satisfy the Commission's merger review criteria. First, the proposed merger will not further the market-opening goals underlying federal communications policy, as Time Warner may continue to attempt to foreclose market entry in areas where it provides telecommunications and cable services. Second, the merger will not produce any affirmative public interest benefits that would not result "but for" the merger. Although AOL Time Warner may sincerely believe that its MOU will produce public interest benefits that would not result "but for" the merger, the MOU is merely a paper promise that has no probative weight.

To overcome this lack of affirmative public interest benefits, the Commission should condition the proposed merger on commitments by AOL Time Warner to: (1) take a neutral stance on the construction and operations of competing networks in its service territories

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File No. NSD-L-96-10, Memorandum Opinion and Order, 12 FCC Rcd 19985, ¶ 29 (1997).

15 47 U.S.C. § 214(c).

16 *Id.*, § 310(d).

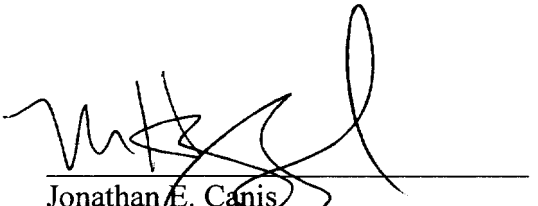
17 MCI WorldCom Order, ¶ 10.

and (2) institute a real, concrete, and enforceable cable open access plan prior to the consummation of the merger. Such commitments on the part of AOL Time Warner would provide substantial support for a finding that the proposed transaction is consistent with the public interest.

IV. CONCLUSION

Consistent with the discussion presented herein, the Commission should deny the proposed AOL Time Warner merger until such time as the applicants demonstrate that the proposed combination will further the pro-competitive goals of the Act and produce concrete public interest benefits.

Respectfully submitted,



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COUNSEL TO MEMPHIS NETWORX, LLC

April 26, 2000

Before the
Federal Communications Commission
Washington, DC 20554

Applications of America Online, Inc. and Time Warner Inc. for Transfers of Control	)))	CS Docket No. 00-30

AFFIDAVIT OF WARD HUDDLESTON, JR.
ON BEHALF OF
MEMPHIS NETWORX, LLC

STATE OF TENNESSEE)
)
CITY OF MEMPHIS)

I, Ward Huddleston, Jr., being of lawful age and duly sworn, do hereby depose and state as follows:

1. My name is Ward Huddleston, Jr. I am the Chief Manager of Memphis Networx, LLC ("Memphis Networx"). My business address is 7555 Appling Center Drive, Memphis, Tennessee 38133-5069. I have over 16 years of experience working for major telecommunications providers as well as start-up telecommunications firms, including United Telephone, Sprint Publishing and Advertising, Inc., and A&L Networks LLC. Prior to my involvement in the telecommunications industry, I was a practicing attorney. I have an extensive educational background, including a Masters of Science in Business from Bristol University, and I received additional business training at the University of Southern California and the University of Pennsylvania, Wharton School of Business Executive Program. I received my Doctor of Jurisprudence Degree from the University of Tennessee at Knoxville, and I received a Bachelor of Science Degree from East Tennessee State University.

2. As Chief Manager, I am the executive ultimately responsible for the success of Memphis Networx. To date, my responsibilities have included, among other things,

developing Memphis Networx's business plan, establishing a core management team to implement that business plan, and obtaining necessary regulatory approvals to begin operating as a facilities-based telecommunications provider in the State of Tennessee.

I. PURPOSE OF AFFIDAVIT

3. The purpose of my affidavit is to describe the substantial public interest risks posed by the proposed merger of America Online, Inc. and Time Warner Inc. (together, "AOL Time Warner"). In direct contravention of the pro-competitive goals of the Communications Act of 1934, as amended ("Act"), Time Warner presently is engaging in efforts to thwart Memphis Networx's entry into Tennessee markets as a competitive network and services provider. Time Warner's efforts harm the public interest by delaying and potentially limiting the ability of consumers to realize the competitive benefits that result from having choices among competing providers.

4. If the Commission were to approve the proposed merger in its present form, AOL Time Warner's incentives to maintain the monopoly status of its cable holdings and prevent the deployment of competitive networks – that is, to thwart the development of competition – would increase. To mitigate these public interest risks, the Commission should require, at a minimum, Time Warner to take a neutral stance to the entry of competitors into the local markets served by Time Warner. Without such a commitment, AOL Time Warner cannot satisfy its burden of demonstrating that the proposed merger is consistent with the public interest.

II. TIME WARNER PRESENTLY IS ENGAGING IN EFFORTS TO THWART MEMPHIS NETWORX'S ENTRY INTO TENNESSEE MARKETS

5. On November 24, 1999, Memphis Networx filed an application with the Tennessee Regulatory Authority ("TRA") for a license to provide facilities-based telecommunications services in the State of Tennessee. Since the filing of the application, Time Warner has engaged in a persistent and concerted effort to foreclose Memphis Networx from obtaining the requisite authority from the TRA to provide services in Tennessee. Not only has Time Warner attempted to derail Memphis Networx before the TRA, Time Warner also has lobbied the Memphis City Council, the Shelby County Board of Commissioners, and the Tennessee Legislature in an effort to prevent Memphis Networx from constructing a broadband open access network for content providers who will eventually compete with Time Warner's telecommunications and cable networks. Before each of these State and City entities, Memphis Networx's efforts to negotiate a resolution of potential concerns have been rebuffed by Time Warner, which indicates their only interest is to delay competition, rather than address issues of the public interest.

6. In addition to lobbying the legislature and essentially every public agency in the State of Tennessee against Memphis Networx, Time Warner's president for the Mid-South Division transmitted on March 15, 2000 a letter, attached hereto as Tab A, to other competitive carriers and potential end users intended to manufacture opposition to Memphis Networx. In this letter, Time Warner attempted to generate fear and uncertainty in the competitive community regarding the "philosophy and goals" of Memphis Networx in Tennessee. The letter suggests that Memphis Networx plans to use public monies to subsidize its competitive efforts in

Tennessee to the detriment of other providers. Unless carriers join Time Warner's efforts to prevent Memphis Networx from constructing facilities and offering service, Time Warner alleges, carriers' "investment in [Memphis] (money, resources, jobs, taxes) ... may be at risk."

7. This is not the first time that Time Warner has attempted to protect its monopoly cable holdings from competition in Tennessee. As early as 1996, Time Warner, through the Tennessee Cable Telecommunications Association ("TCTA"), attempted to preclude BellSouth from constructing facilities that could be used to provide alternative cable television services. Similar to the present antics of Time Warner, the TCTA, in a complaint filed with the Federal Communications Commission ("FCC"), alleged that BellSouth was cross-subsidizing its cable build-out with revenues obtained from BellSouth's regulated services. Although BellSouth eventually won the complaint on the merits, *see* Tab B, the cable monopolists successfully undermined and slowed BellSouth's deployment of competing cable infrastructure to the detriment of Tennessee consumers.

III. APPROVAL OF THE AOL TIME WARNER MERGER IN ITS PRESENT FORM WILL INCREASE TIME WARNER'S INCENTIVE TO OPPOSE NEW ENTRANTS, SUCH AS MEMPHIS NETWORX

8. As demonstrated, Time Warner has engaged in a pattern of activity calculated to deter, delay, and deny new companies from developing networks that compete with Time Warner's cable holdings. Approval of the AOL Time Warner merger in its present configuration would further increase Time Warner's incentive to protect the monopoly status of its cable holdings by opposing the deployment of new facilities, such as those that Memphis Networx plans to construct.

9. AOL Time Warner's pleadings demonstrate that the combined company plans a three-pronged strategy for competing in the information age. First, AOL Time Warner wishes to deploy its content-based services to as many consumers as possible over as many transmission networks as possible. Second, as evidenced by its vague and unenforceable "Memorandum of Understanding," AOL Time Warner wishes to preclude, to the extent possible, consumers from accessing non-AOL content over Time Warner's cable networks (*i.e.*, no real cable open access). Third, AOL Time Warner wishes to preserve its status as a monopoly provider in areas in which it holds cable franchises. Although these poisonous synergies may benefit AOL Time Warner, these synergies will not result in benefits that serve consumers or further the pro-competitive goals of the Act.

IV. CONCLUSION

10. To mitigate the public interest risks presented by the AOL Time Warner merger, the Commission, at a minimum, should require Time Warner to take a neutral stance to the entry of competitors into areas served by Time Warner. Without such a commitment, AOL Time Warner cannot satisfy its burden of demonstrating that the proposed merger is consistent with the public interest. Indeed, without such a commitment the proposed merger would serve to frustrate, rather than further, the public interest.

This concludes my affidavit.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on April 25, 2000

Ward Huddleston, Jr.
Chief Manager, Memphis Networx, LLC

STATE OF TENNESSEE

CITY OF MEMPHIS

Subscribed and sworn to before me
this 25th day of April, 2000.

Notary Public

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Fax 901-369-4518
E-mail: deandoyle@twcable.com

Dean A. Doyle
President

TIME WARNER COMMUNICATIONS

March 15, 2000

Dear Telecommunications Manager;

I am writing to you to inquire as to what you know or have heard about Memphis Networx, the new joint venture between MLGW and A&L Construction. For the past 18 months, I have been told that MLGW was going to install some fiber-optic cables for their own use, and also wanted to partner with an outside company to be able to lease excess capacity to telecommunications companies like yours and mine. I have been repeatedly told in person, in writing, and through all of their public statements and press releases that their plan was to sell, "WHOLESALE ONLY TO TELECOMMUNICATIONS COMPANIES, NO RETAIL, NO END-USERS, A CARRIER'S-CARRIER."

I was amazed when just recently I discovered the following:

1. Their written plan on how to enter the business states:
   "TELL YOUR COMPETITORS THEY ARE CUSTOMERS."
2. They fully intend, through Memphis Networx, or through another of their owned or controlled subsidiaries, to enter **EVERY** wholesale and retail area of telecommunications, **INCLUDING YOUR BUSINESS.**
   (See the attached copy of their application to the City of Memphis.)
3. They have already held discussions with major end-users in the market, **YOUR CURRENT CUSTOMERS**, about doing business directly with Memphis Nextworx, instead of with you.

None of these items would normally be a problem for your company or mine. We are in a very competitive industry, and Memphis is already a very competitive market. The dozens of telecommunications companies currently doing business in Memphis probably have similar goals. The difference is that you and I are not being supported by public money and resources. As private companies, our resources are limited to the investments made by our shareholders. The City of Memphis, through MLGW, has budgeted $110 million to accomplish this project of taking your customers. $20 million has already been made available through MLGW to A&L Construction, a company that has never run a telecommunications network before.

The Memphis City Council, the Shelby County Board of Commissioners, and the (TRA) Tennessee Regulatory Authority, are scheduling hearings on the permits and licenses necessary for Memphis Networx to operate.

Tentative schedule of hearings:

Memphis City Council	-	Tuesday, March 21	-	City Hall, 5th Floor, conference rm.
TRA	-	Wednesday, March 29	-	Nashville
Memphis City Council	-	Tuesday, April 11	-	City Hall, 5th Floor, conference rm.
Shelby County Board	-	Monday, April 24	-	Shelby Co. Bldg. 6th Floor

(all times to be announced)

You need to attend these meetings so that your voice is heard.

We have discovered that the Memphis City Council was <u>not</u> aware of the extent to which MLGW was planning to use public funds to compete with private companies. They will be debating this issue. You need to let the City Council know how you and your company feel about this. It is your investment in this city (money, resources, jobs, taxes) that may be at risk, unless a level playing field and fair competition is maintained.

I found it necessary to alert you to these issues since so far, I have discovered, that like Time Warner, every telecommunications company I have talked with has not been provided the full story about the philosophy and goals of Memphis Networx.

Please be involved, and feel free to contact me if you have any questions.

Sincerely,

Dean A. Deyo
Time Warner Communications
President
Mid-South Division

attachments

DAD/mwa

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Tennessee Cable Telecommunications Association, *et al.*,	)	
	)	
and	)	
	)	
Cable Television Association of Georgia, *et al.*,	)	File No. E-97-10
	)	
Complainants,	)	
	)	
v.	)	
	)	
BellSouth Telecommunications, Inc.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: April 19, 2000 Released: April 20, 2000

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny a complaint filed by the Tennessee Cable Telecommunications Association (TCTA) and the Cable Television Association of Georgia (CTAG) (collectively, Complainants) against BellSouth Telecommunications, Inc. (BellSouth) pursuant to section 208 of the Communications Act of 1934, as amended (Act or Communications Act).[1] In particular, we deny Complainants' claim that BellSouth is allocating joint and common costs between its telephony and cable services in a manner that violates the Commission's cost allocation rules, because we find that

[1] 47 U.S.C. § 208.

BellSouth's allocation methodology is sufficiently usage-based.[2] In addition, we deny Complainants' claim that BellSouth violated the Commission's affiliate transactions rules[3] by failing to attribute to its cable affiliate the benefits allegedly conveyed when BellSouth constructed cable systems without first obtaining franchises, because we find that the record lacks persuasive evidence that such construction actually transferred or provided any benefit or service to BellSouth's affiliate. Finally, we deny Complainants' claims that BellSouth violated sections 202(a) and 224(g) of the Act[4] by charging its affiliate different pole and conduit rates than it charged non-affiliates, because we find that the record reveals that each of these claims was either settled or abandoned.

II. BACKGROUND

A. The Parties

2. Complainant TCTA is a cable television industry trade association representing cable television operators in Tennessee.[5] Likewise, Complainant CTAG is a cable television industry trade association representing cable television operators in Georgia.[6] Defendant BellSouth is a provider of local exchange service that, at the time the complaint was filed, was preparing to offer cable services in Tennessee and Georgia, both directly and through its affiliate, BellSouth Interactive Media Services (BIMS).[7]

3. Prior to the initiation of this proceeding, BellSouth began constructing communications facilities, including laying fiber optic and coaxial cable, in and around Nashville and Memphis, Tennessee, and Atlanta, Georgia.[8] BellSouth apparently intended to use these facilities at some point in the future to provide both telephony service and cable

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2 *See* 47 C.F.R. § 64.901.

3 *See* 47 C.F.R. § 32.27.

4 47 U.S.C. §§ 202(a), 224(g).

5 *Tennessee Cable Telecommunications Association, et al., and Cable Association of Georgia, et al. v. BellSouth Telecommunications, Inc.*, Complaint, File No. E-97-10 (filed Jan. 27, 1997) at 2, ¶ 1 (Complaint); *Tennessee Cable Telecommunications Association, et al., and Cable Association of Georgia, et al. v. BellSouth Telecommunications, Inc.*, Response, File No. E-97-10 (filed March 10, 1997), at 2, ¶ 1 (Response).

6 Complaint at 2, ¶ 2; Response at 2, ¶ 2.

7 Complaint at 2, ¶ 3; Response at 2, ¶ 3.

8 Complaint at 3, ¶¶ 7-9; Response at 4, ¶ 10.

service.[9] At the time of construction, however, neither BellSouth nor any of its affiliates held franchises under section 621(b) of the Act to provide cable service in these locations.[10]

B. The Commission's Cost Allocation and Affiliate Transactions Rules

4. The Communications Act and the Commission's rules seek to prevent common carriers from subsidizing their nonregulated or competitive services with revenues derived from regulated or noncompetitive operations.[11] When a common carrier subject to the Act uses some of the same facilities to provide both telephony service and an unregulated service, the common carrier must allocate the costs of such facilities in a manner prescribed by Part 64 of the Commission's rules.[12] These rules are designed to prevent cross-subsidization of nonregulated activities by establishing a methodology for allocating "joint" and "common" costs between regulated and nonregulated activities.[13] In general, the methodology requires carriers to allocate costs directly, wherever possible, to regulated or nonregulated activities. However, joint and common costs related to central office equipment and outside plant investment must be allocated between regulated and nonregulated activities

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[9] Despite certain general denials, *see* Response at 3-4, ¶¶ 7-9, BellSouth's cost allocation manual demonstrates that it intended to share the transmission facilities at issue between telephone service and cable service. *See, e.g., BellSouth Telecommunications 1996 Cost Allocation Manual for Apportionment of Costs Between Regulated Telephone Service and Nonregulated Activities*, Sections II, VI (filed Jan. 11, 1996).

[10] *See* Complaint at 4, ¶ 12; Response at 5, ¶ 12. Section 621(b) of the Act states that "a cable operator may not provide cable service without a franchise." 47 U.S.C. § 541(b).

[11] *See, e.g., Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 17539, 17550, ¶ 24 (1996) (*Accounting Safeguards Order*).

[12] 47 C.F.R. § 64.901.

[13] We use the word "joint" to describe costs incurred when two or more services are produced by the same facility or operation. An example of a "joint" cost is central office switching equipment used to provide multiple services, such as voice messaging and alarm monitoring. We use the term "common" to describe costs incurred in the provision of two or more services that would not change appreciably with changes in the quantity provided of a particular service. *See Implementation of Section 254(k) of the Communications Act of 1934, as Amended*, Order, 12 FCC Rcd 6415, 6420 n.25 (1997) (*Section 254(k) Order*). An example of a "common" cost is the cost of the chief executive's desk. A carrier will typically provide multiple services over the same network because the cost of providing these services on shared facilities, under shared management, is less than the cost of providing these services on separate facilities under separate management. A substantial portion of these costs of shared facilities and operations are joint and common costs. It is often difficult to approximate the actual portion of such costs for which each product or service is responsible. *Id.* at 6420, ¶ 8.

according to "the relative regulated and nonregulated *usage* of the investment."[14] The Commission established these rules to keep incumbent local exchange carriers from imposing the costs and risks of their competitive ventures on interstate telephone ratepayers, and to ensure that interstate ratepayers share in the economies of scope realized by incumbent local exchange carriers when they expand into additional enterprises.[15]

5. In addition, section 254(k) of the Act provides that incumbent local exchange carriers must "not use services that are not competitive to subsidize services that are subject to competition."[16] Section 254(k) seeks to prevent incumbent local exchange carriers from attempting to gain an unfair advantage in competitive markets by allocating to their less competitive services, for which subscribers have few or no available alternatives, an excessive portion of the costs incurred by their competitive operations.[17]

6. When a common carrier does business with a nonregulated affiliate, it must record the associated costs pursuant to certain Commission requirements known as "affiliate transactions rules." These rules are designed to protect interstate ratepayers from subsidizing the competitive ventures of an incumbent local exchange carrier's affiliates.[18] Specifically, section 32.27 of the Commission's rules requires "transactions with affiliates involving asset transfers into or out of the regulated accounts [to be] recorded" according to a hierarchy of rules.[19] Similar rules apply to certain non-tariffed services provided between a carrier and its affiliate.[20]

C. BellSouth's Cost Allocation Methodology

7. In order to assist in the enforcement of the foregoing cost allocation and affiliate transactions rules, the Commission requires each local exchange carrier with annual

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[14] 47 C.F.R. § 64.901(b)(4)(emphasis added).

[15] *Accounting Safeguards Order*, 11 FCC Rcd at 17550, ¶ 25.

[16] 47 U.S.C. § 254(k). This statutory provision was later codified in the Commission's rules at 47 C.F.R. § 64.901(c).

[17] *See Section 254(k) Order*, 12 FCC Rcd at 6419-21, ¶¶ 7-9.

[18] *See* 47 C.F.R. § 32.27.

[19] 47 C.F.R. § 32.27(a).

[20] 47 C.F.R. § 32.27(c) (Notably, "[f]or all other services provided by a carrier to its affiliate, the services shall be recorded at the higher of fair market value and fully distributed cost.").

operating revenues above a certain threshold to file a Cost Allocation Manual (CAM) with the Commission.[21] Among other things, the CAM must describe each of the carrier's nonregulated activities; identify each affiliate that engages in or will engage in transactions with the carrier and describe the nature, frequency, and terms of each transaction; and show the method used to assign and allocate costs between regulated and nonregulated operations.[22]

8. On June 30, 1995, BellSouth filed with the Commission an amendment to its CAM.[23] This CAM amendment indicated BellSouth's intent to provide cable service through the use of some of the same facilities that it uses to provide telephony service.[24] In order to satisfy the Commission's cost allocation rules, BellSouth devised a methodology for separating and allocating its joint and common costs incurred for the provision of regulated telephone service and nonregulated cable service. Under its methodology, the costs of common investments, such as fiber cable, shared office space, and poles and conduits, were to be allocated based on the relative number of subscriber circuits for each service.[25] In other words, in an effort to satisfy the usage-based standard prescribed by section 64.901(b)(4) of the Commission's rules, BellSouth determines the relative usage of its facilities by telephony and cable services by comparing the projected number of telephone lines used by its subscribers with the projected number of cable service subscribers.[26] For example, if certain

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[21] 47 C.F.R. § 64.903.

[22] *Id.*

[23] *Tennessee Cable Telecommunications Association, et al., and Cable Association of Georgia, et al. v. BellSouth Telecommunications, Inc.*, Opposition Brief of Respondent BellSouth Telecommunications, Inc., File No. E-97-10 (filed Aug. 29, 1997) at 3 (Opposition Brief of BellSouth).

[24] *Id.* The CAM amendment stated that "BellSouth . . . will provide cable system facilities for the provision of cable service either by itself or through affiliated cable operations." *See, e.g., BellSouth Telecommunications 1996 Cost Allocation Manual for Apportionment of Costs Between Regulated Telephone Service and Nonregulated Activities*, Section II, page 5 (filed Jan. 11, 1996). Moreover, the 1996 CAM also indicated that certain circuit equipment would be allocated between telephony and cable services. *See id.* at Section VI, Table 2, page 2.

[25] Opposition Brief of BellSouth at 5. BellSouth's CAM indicates that joint and common costs are to be apportioned between regulated and nonregulated services on the basis of "[p]rojected cable service and telephony subscriber circuit counts." *BellSouth Telecommunications 1996 Cost Allocation Manual for Apportionment of Costs Between Regulated Telephone Service and Nonregulated Activities*, Section VI, Table 2, page 5 (filed Jan. 11, 1996).

[26] *Tennessee Cable Telecommunications Association, et al., and Cable Association of Georgia, et al. v. BellSouth Telecommunications, Inc.*, BellSouth's Responses to Complainants' Second Set of Interrogatories, File No. E-97-10, Response to Interrogatories No. 2, 3 (BellSouth's Responses to Complainants' Second Set of Interrogatories).